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U.S. Bankruptcy Appellate Panel of the Tenth Circuit

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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE KOPEXA REALTY VENTURE CO., Debtor.	BAP No. KS-03-083
EARL E. "SKIP" KOPP, and CAROLYN K. KOPP, Appellants, v. CARL R. CLARK, Trustee, UNITED STATES LIFE INSURANCE COMPANY, and ALL AMERICAN LIFE INSURANCE COMPANY, Appellees.	Bankr. No. 95-21261-7 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Kansas

Before CLARK, CORNISH, and McNIFF, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

Earl E. Kopp (Earl) and Carolyn K. Kopp (Carolyn) (collectively, the "Kopps") appeal two Orders entered by the United States Bankruptcy Court for the District of Kansas: the first, an Order approving the Chapter 7 trustee's Final Report and Application for Discharge (Final Report Order); and the second, an Order denying the Kopps' motion to reconsider the Final Report Order (Reconsideration Order). For the

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

reasons stated below, this appeal is DISMISSED for lack of jurisdiction.

I. Background

The debtor is a Kansas general partnership that owned and operated a shopping center. The shopping center's primary tenant was insider C.K. Williams, Inc. (CK). The Kopps are partners of the debtor.

In 1995, the debtor filed a case seeking relief under Chapter 11 of the Bankruptcy Code. Carl R. Clark was appointed as Chapter 11 trustee. The debtor's Chapter 11 case was ultimately converted to a case under Chapter 7, and Mr. Clark was appointed as the Chapter 7 trustee.

In 1996, after the debtor's Chapter 11 case was converted to Chapter 7, the bankruptcy court approved the trustee's sale of substantially all of the debtor's assets to All American Life Insurance Company and the United States Life Insurance Company in the City of New York (collectively, "USLIFE"), a secured creditor of the debtor (Sale Order). The Kopps appealed the Sale Order, but this Court dismissed their appeal as moot under § 363(m).[1]

In 2000, the bankruptcy court entered an order approving a "Stipulation for Settlement of Claims" (Claims Stipulation) made by the Kopps, the trustee in the debtor's case, and the trustee in CK's Chapter 7 case (CK Trustee). The Claims Stipulation was made by the trustee in part to attempt to stem the barrage of litigation that had been initiated by the Kopps, or parties related to them.[2] The trustee and the

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[1] In re Kopexa Venture Realty Co., BAP No. KS-96-045 (10th Cir. BAP Feb. 28, 1997) (Kopexa I).

[2] At least five other appeals have been filed in this Court by Earl or the Kopps related to the debtor's case. *See, e.g.*, In re Kopexa Realty Venture Co., BAP No. KS-03-082 (10th Cir. BAP May 25, 2004) (Kopexa VI) (the Kopps' appeal of orders related to Earl's participation at the hearing on the Final Report was dismissed for lack of jurisdiction); In re Kopexa Realty Venture Co., BAP No. KS-02-042, 2003 WL 21191108 (10th Cir. BAP May 21, 2003) (Kopexa V) (Earl's appeal of an order refusing to allow him to participate in claims litigation was dismissed for lack of jurisdiction); In re Kopexa Realty Venture Co., 240 B.R. 63 (10th Cir. BAP 1999) (Kopexa III) (Earl's appeal of an order related to the trustee's appointment dismissed

(continued...)

CK Trustee agreed in the Claims Stipulation to release, discharge and abandon any claims against the Kopps, or persons and entities related to the Kopps. The Kopps, in turn, agreed to release any and all claims against the debtor and CK. They further agreed to "make no claims against any assets of the Estates, make no objection to any other claims in the Estates, and have no further involvement in either of the aforementioned bankruptcy proceedings, themselves or through any third parties."[3] Notwithstanding the Claims Stipulation and its waiver of claims against the Kopps and persons and entities related to them, the Kopps assert that they have a right to any residual estate in the debtor's case, and based on that belief, they have objected to claims and sought permission to participate in administrative matters in the debtor's case.

In May 2003, the trustee filed a "Final Report and Application for Discharge" (Final Report). In the Final Report, the trustee proposed to partially pay allowed unsecured claims against the debtor. There was no residual estate to pay to the Kopps because allowed unsecured claims exceeded the net amount to be distributed.

Earl and two creditors filed written objections to the Final Report. Earl appeared at hearing on the Final Report *pro se*. Carolyn did not enter an appearance. Despite the Claims Stipulation, the bankruptcy court allowed Earl to participate at the hearing,[4]

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[2] (...continued)
because Earl lacked standing to appeal); In re Kopexa Venture Realty Co., 213 B.R. 1020 (10th Cir. BAP 1997) (Kopexa II) (order approving a settlement between trustee and CK Trustee was vacated in an appeal brought by the Kopps because it did not contain sufficient findings of fact and conclusions of law); Kopexa I, BAP No. KS-96-045 (10th Cir. BAP Feb. 28, 1997) (the Kopps' appeal of the Sale Order dismissed as moot); *see also* In re Kopexa Realty Venture Co., BAP No. KS-99-029, 2000 WL 148918 (10th Cir. BAP Feb. 11, 2000) (Kopexa IV) (order denying motion by creditor Don A. Kopp to clarify the Sale Order was affirmed).

[3] Claims Stipulation ¶ 2, *in* Appellees' Joint Appendix at Tab 1.

[4] Earl requested permission to participate at the hearing on the Final Report. The bankruptcy court entered an Order granting Earl's request, but the Kopps did not believe that the Order properly reflected the bankruptcy court's ruling. Accordingly,
(continued...)

and Earl presented his objections to the Final Report. Earl objected on several grounds, but the only objection relevant to this appeal is that the Final Report improperly proposed a distribution to USLIFE. According to Earl, USLIFE's claim should have been disallowed, which would have resulted in a residual estate that could be distributed to him.

At the close of argument, the bankruptcy court approved the Final Report with some modifications not relevant to this appeal, and subsequently entered an Order approving the Final Report, defined above as the "Final Report Order." The Kopps requested that the bankruptcy court reconsider its Final Report Order, again alleging that USLIFE was not entitled to a distribution in the debtor's case (Reconsideration Motion). The bankruptcy court summarily denied the Kopps' Reconsideration Motion in its "Reconsideration Order."

The Kopps timely filed a notice of appeal from the Final Report Order and the Reconsideration Order, both of which are "final" Orders for purposes of appellate review.[5] The parties have consented to this Court's jurisdiction because they have not elected to have this appeal heard by the United States District Court for the District of Kansas.[6]

II. Discussion

1. Carolyn must be dismissed as a party to this appeal.

As has been well-established by this Court in this debtor's case, only persons

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[4] (...continued)
they moved to amend the Order, but that motion was denied. The Kopps filed an appeal of both Orders on the same day that they filed the present appeal. That appeal has been dismissed. Kopexa VI, BAP No. KS-03-082 (10th Cir. BAP May 25, 2004).

[5] 28 U.S.C. § 158(a)(1); *see* Fed. R. Bankr. P. 8002(a) (governing timeliness of appeal).

[6] 28 U.S.C. § 158(c); Fed. R. Bankr. P. 8001(e).

who are aggrieved by a bankruptcy court order have standing to appeal.[7] "Prerequisites for being a 'person aggrieved' are attendance and objection at a bankruptcy court proceeding."[8] If a person is not aggrieved by an order appealed, the appeal must be dismissed.[9]

Carolyn did not object to the trustee's Final Report, or enter an appearance at the hearing on that Report. Not having objected to the Final Report, she did not have standing to request the bankruptcy court to reconsider the resulting Final Report Order. In short, Carolyn is not a "person aggrieved" with standing to appeal the Final Report Order or the Reconsideration Order and, therefore, she is dismissed as a party to this appeal.

2. This appeal is moot and, therefore, it must be dismissed.

As we have explained in other decisions in this debtor's case, this Court only has jurisdiction to consider "cases" and "controversies."[10] This requirement is not met if a controversy is moot. It is well-established that:

> "'[A] case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" A controversy is no longer "live" if the reviewing court is incapable of rendering effective relief or restoring the parties to their original position . . . . In re King Resources Co., 651 F.2d 1326, 1331-32 (10th Cir. 1980) (if the only effect of reversal on appeal would be to order the impossible, we should not address the merits of the appeal.)[11]

The Final Report Order approves the trustee's Final Report with some

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[7] *See, e.g.*, Kopexa III, 240 B.R. at 65 (citing cases); Kopexa V, 2003 WL 21191108 at *4-5; *see also* Kopexa VI, BAP No. KS-03-082 (10th Cir. BAP May 25, 2004).

[8] In re Weston, 18 F.3d 860, 864 (10th Cir. 1994) (quotation omitted), *quoted in* Kopexa III, 240 B.R. at 65 n.3.

[9] *See, e.g.*, id.

[10] U.S. Const. art. III, § 2, cl.1; *see* Kopexa V, 2003 WL 21191008 at *4 (citing In re Long Shot Drilling, Inc., 224 B.R. 473, 477 (10th Cir. BAP 1998)).

[11] Long Shot Drilling, 224 B.R. at 477-78 (quoting County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (further quotations and citations omitted)), *quoted in* Kopexa V, 2003 WL 21191108 at *4.

modifications. Earl did not obtain a stay of the Final Report Order pending appeal and, as a result, the trustee has completed distributions to creditors pursuant to the approved Final Report. Furthermore, all of the checks that the trustee distributed from the estate have been cashed. Accordingly, we are incapable of rendering effective relief and, therefore, Earl's appeal must be dismissed as moot.

Earl contends that he was denied due process.[12] If this were true, the Final Report Order would be void. But, for the reasons set forth below, we conclude that the Final Report Order is not void because Earl was afforded due process.

Due Process requires notice and an opportunity to be heard.[13] Earl does not dispute that notice was proper in this case, and the record demonstrates that Earl was given an opportunity to be heard. The bankruptcy court granted Earl's motion seeking permission to participate at the hearing on the Final Report despite the fact that, in the Claims Stipulation, Earl agreed not to participate in the debtor's case so that claims against himself and persons and entities related to him would be released.[14] Earl filed an objection to the Final Report, and presented lengthy argument to the bankruptcy court outlining his objections. The bankruptcy court received Earl's objections and carefully disposed of each of them, both in its ruling from the bench and in the Final Report Order. Earl was given an opportunity to be heard.

Although not fully articulated, Earl appears to argue that he was not given an opportunity to be heard and, thus was denied due process, because the bankruptcy court did not to consider his alleged evidence related to the allowance of USLIFE's claim.

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[12] Earl's due process argument was made in a related, but separate appeal. Kopexa VI, BAP No. KS-03-082 (10th Cir. BAP May 25, 2004). In that case, we held that this argument was more relevant to and would be considered as part of this appeal.

[13] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Grannis v. Ordean, 234 U.S. 385, 394 (1914); Reliable Elec. Co. v. Olson Constr. Co., 726 F.2d 620 (10th Cir. 1984).

[14] *See* Kopexa VI, BAP No. KS-03-082 (10th Cir. BAP May 25, 2004).

This argument is without merit. A party is not denied due process because he does not agree with a trial court's evidentiary rulings. Thus, Earl was not denied due process and the Final Report Order and the Reconsideration Order are not void.

We note that even if we were to consider the merits of this appeal we would affirm the Final Report Order and the Reconsideration Order. The bankruptcy court's decision to preclude Earl's alleged evidence related to USLIFE's claim was not an abuse of discretion.[15] Our review of the record discloses that Earl did not attempt to "introduce" evidence related to USLIFE's claim.[16] He made lengthy arguments as to why USLIFE's claim should not be allowed, and stated that he was entitled to an evidentiary hearing. After hearing Earl's argument, the bankruptcy court overruled his objection, stating that it was without merit. The effect of its ruling was to deny Earl an evidentiary hearing on the allowance of USLIFE's claim. This result was not a "clear error of judgment" or beyond "the bounds of permissible choice in the circumstances" for several reasons.[17]

The Claims Stipulation expressly states that Earl cannot object to claims. If granted, his request for an evidentiary hearing at the Final Report hearing would have allowed him to object to USLIFE's claim in violation of the Claims Stipulation. Even if Earl could object to USLIFE's claim, he did not timely do so. USLIFE's claim was

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[15] United States v. Magleby, 241 F.3d 1306, 1315 (10th Cir. 2001), *cited in* Appellants' Brief at 10.

[16] Earl has included a "Settlement Agreement and Mutual Release of All Claims" in his appellate record. Appellants' Appendix at 57. This Settlement appears to be the "evidence" that the bankruptcy court refused to consider. It is hand-marked as "Exhibit B." The transcript of the hearing reveals that Earl did not request that the bankruptcy court admit this Settlement into evidence. Perhaps, it was attached to his objection to the Final Report as Exhibit B. The Court, however, has no way of knowing that fact because Earl did not include his written objection in the appellate record. In any event, no foundation for the Settlement was laid and, given the appellate record, it is impossible to discern what this Settlement is. Earl's failure to establish a proper record for review makes arguments based on the Settlement impossible to review.

[17] Moothart v. Bell, 21 F.3d 1499, 1504 (10th Cir. 1994) (citation and quotation omitted).

allowed as part of the Sale Order, and that Order became final in 1996. Earl's attempt to attack USLIFE's claim at the hearing on the Final Report was an improper collateral attack of the Sale Order.

The bankruptcy court also did not abuse its discretion by entering its Reconsideration Order.[18] Earl's Reconsideration Motion asserted no grounds for reconsideration under Federal Rules of Civil Procedure 59 or 60(b), made applicable in bankruptcy under Federal Rules of Bankruptcy Procedure 9023 and 9024. Simply, Earl disagreed with the bankruptcy court's decision to approve the Final Report, and the Reconsideration Motion reiterated rejected objections to that Report. Because Earl failed to show any grounds for reconsideration of the Final Report Order, we are convinced that the bankruptcy court did not make "a clear error of judgment" and that it did not exceed "the bounds of permissible choice in the circumstances" in entering the Reconsideration Order.[19]

III. Conclusion

For the reasons stated above, the above-captioned appeal is DISMISSED.

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[18] *See, e.g.*, Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324, 1331 (10th Cir. 1996) (abuse of discretion standard applies to motion to amend a judgment under Fed. R. Civ. P. 59(e)); Stubblefield v. Windsor Capital Group, 74 F.3d 990, 994 (10th Cir. 1996) (abuse of discretion standard applies to motions to set aside a judgment under Fed. R. Civ. P. 60(b)), *cited in* Kopexa IV, 2000 WL 148918 at *4.

[19] Moothart, 21 F.3d at 1504.